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ABSTRACT

The speech communication department at the University of Wisconsin, Madison, provides a rigorous and legally oriented course in freedom of speech. The objectives of the course are to help students gain insight into the historical and philosophical foundations of the First Amendment, the legal/judicial processes concerning the First Amendment, and the extra-legal forces and contemporary problems that restrict free speech, as well as the communicative process. The course requires a variety of readings, including Z. Chafee's "Free Speech in the United States," F. Haiman's "Speech and Law in a Free Society" and "Freedom of Speech," various Supreme Court decisions, and selections from the "Free Speech Yearbook," communication journals, and law reviews. Guest lecturers, such as attorneys, former graduate students, and First Amendment authorities are frequently invited to speak to the classes. For the two in-class and final exams, students write on two or three topics from a choice of five or six. For the take-home exam, students pretend they are Supreme Court Justices and write an opinion regarding a conviction for expression. Following an introductory unit, the course is divided into units on political heresy and national security; provocation to anger and disturbing the peace; obscenity, pornography, and the law; and current controversies, such as gag rules and closed courtrooms, and school censorship. (HTH)

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TEACHING FREEDOM OF SPEECH

Ruth McGaffey

Known for her dry wit as well as her excellent teaching, 1980 Weaver Award winner Ruth McGaffey received her B.A. from St. Olaf College (1953), her M.A. from the University of Nebraska (1955) and her Ph.D. from Northwestern (1970). Prior to going to U.W.M., Ruth had taught at Concordia College in Moorhead, Minn. and Boston College. A veteran of twelve years of coaching debate, three years chairing the department at U.W.M., she varied her academic life by teaching at London University in the spring of 1981 and last year was granted a sabbatical to develop courses in legal communication.

When I was a debate coach, my debaters called me Vince Lombardi. When I teach freedom of speech, my students say that I think I am Professor Kingsfield of Paper Chase fame. They may be right. Without being a total tyrant (and some would disagree with that), my aim is to teach freedom of speech with a good deal of academic rigor and a lot of humor. I feel good when students come back from law school and say that my First Amendment course was as tough as the one they took there. I work hard in this course and I expect my students to work hard too. I think it is worth it.

Freedom of speeech classes are relatively new in departments of speech communication. For years they were the property of political science, philosophy and law departments. Just as communication has appropriated parts of psychology, sociology and linguistics, it has now adopted the First Amendment. Each time that departments of speech have incorporated the research and theory of another discipline, they have been charged with watering down the material. The same has been said about First Amendment courses, and some times the charges are true. Many communication teachers are interested in the problems posed by the exercise of First Amendment rights and the conflicts between those rights and other societal interests. That does not mean, however, that they have the knowledge of law or history which allows them to teach an academic course in freedom of expression. I do not believe we need glorified rap sessions in departments of speech communication. We have enough problems with our image without Mickey Mouse courses. I will advocate, therefore, a rigorous, legally oriented course or none at all.

I do not mean that we should copy a political science course. I do believe that we can make our courses different, and often better, by including insight into the communicative process. We should know something about the types of responses that occur as a result of varying kinds of messages. We know something about the differences between

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reaction to verbal and non-verbal stimuli. We know about dissonance and defense mechanisms. Because we understand small group processes and persuasion, we can explain better than most the ways and means of the judicial process, how courts and juries work and how the Supreme Court arrives at its decisions. We know something about how crowds work and perhaps how minority groups use "the rhetoric of access" to gain attention. Yes, those of us in speech communication have the tools to make a unique contribution to the free speech course. I strongly believe, however, that that contribution must be based on a strong foundation of knowledge of the legal process and the historical development of First Amendment Law.

For most people contemplating teaching such a course for the first time, it is not inappropriate to spend a semester or a year tooling up. Sabbaticals, teaching improvement grants, summer support and released time can encourage such an effort. Of course such a course can be mounted without a period of prep time, but most of us know from experience that teaching a course for which we are unprepared is not only unrewarding, but downright embarrassing.

Having made some of my biases clear, I will try to become more constructive. I intend to discuss how I teach a free speech course, what materials I use and how I use them. I hope that even if you choose to teach a course to a different level of students or in a different way, some of the things I do will be helpful.

COURSE OBJECTIVES

I hesitate to say that my most important objective is to make my students "think like a lawyer," but I will say it is to make them think. I agree with Professor Kingsfield when he says to his students, "you come in here with a brain full of mush." Their heads are certainly full of mush about the First Amendment. On the one hand they believe that "of course we have free speech; it's in the Constitution," and on the other hand, they don't really believe in free speech. They have ideas about majority rule, but few about the purpose of a constitution. They believe in community standards, but also in complete individual freedom. They think that the Supreme Court gets its decisions from Mount Sinai and can't believe it could be inconsistent. They think everyone should have free speech, and that Congress should ban everything harmful. They mutter about "Clear and present danger" and "shouting fire in a crowded theatre," but have no idea that both phrases were used to imprison a young man who urged draft resistance. When they leave they are probably more realistic and perhaps more cynical, and I hope they have learned to question every pat statement ever made about free speech. I think that forcing students to question every belief they have ever had is the most important function of a teacher.

Of course there are other important objectives. They include:

1. To understand the historical and philosophical foundations of

the First Amendment.
2. To understand the legal/judicial process and its relation to First Amendment interpretation and development.
3. To understand the extra-legal forces which restrict free speech.
4. To understand contemporary problems in freedom of speech.
5. To gain insight into these problems through the application of communication theory and research.

FORMAT

I have taught freedom of speech as a unit in the basic course and as a freshman seminar. I have also helped colleagues develop a course for the high school. I prefer to teach it, however, as an upper division/graduate level course. Most of the students usually about 35, are undergraduates, but there are normally about four or five graduate students. I also prefer to teach it as a night class. I usually teach it one night a week from 5:30 to 8:10 or from 6:30 to 9:10 P.M. The reason I prefer the night class is that it increases the chances of getting some "real people" in the class - that is older than average; the majority of them still have an undergraduate outlook, and I like to challenge that with a few people from "later life." Sometimes that means, as in the early seventies, that the older students will be more conservative than the rest. I recall a police officer who blew his cover when he could no longer stand what he called the "ivory tower" view of the other students when they discussed demonstrations. I remember a forty year old married woman who admitted with a red face that she had never seen a Playboy because her husband said she "didn't need it." I even remember a retired gentleman who had been involved in the early days of labor organizing in Milwaukee and could tell about labor riots and company goons who shot people. Nowadays I need those older students for just the opposite reason--the kids have become too conservative. Just last week, one undergraduate said that everyone who sold a magazine with any nudity at all should be put away for a long time. She was seconded by a young man who said that all erotic literature, even classics, should be banned. In that class it is nice to have two older women with children who are appalled at the uptight attitude of American society about sex, and a couple of Vietnam veterans who believe that all national security decisions should be debated in order to prevent another useless war.

In addition, I like the one night a week plan. I usually spend about an hour on some kind of a lecture from me or from a guest. Then, after we break we discuss, debate, yell, and scream. I make them brief cases and we discuss the decisions. I do my best to get them into a verbal fight with me or with each other. I am ready to take any side of any issue to get them going. It helps to have all those years of debate coaching behind me. Debaters and debate coaches know how to agitate. The danger of course is getting carried away and intimidating the students. Not that a little intimidation isn't good, but if my purpose is to make students think, I don't want them terrified. In the good old days, I could usually count on having a debater in the class. I could always argue with him and the rest of the class caught on soon. Now I am always

glad to see some student I have previously had in another class. If they come back for more, they probably are tough enough to serve as the goat.

During the first class period I bring in ten or twelve newspaper clippings describing the most controversial situations possible. This year they were about Nazi and KKK demonstrations, public burnings of rock records, firebombings of adult bookstores and feminists pouring blood on pornographic displays. After an hour of lively, if sometimes uninformed and perhaps occasionally irrational debate, the students know something about what to expect. Then I pass out the syllabus and they understand the hard part--lots and lots of reading.

MATERIALS

Textbooks

I have tried a number of texts. Since I want students to understand the early development of the First Amendment, I require them to read some of Zechariah Chafee's Free Speech in the United States. Chafee was a law professor at Harvard and really began the academic study of freedom of expression. Unfortunately, that book is out of print and must be used on a reserve basis. I have, therefore, cut the amount of reading in it, but there is no real substitute.

I have also used Thomas I. Emerson's The System of Freedom of Expression. Emerson is an Emeritus Professor of Law at Yale, and this is a heavy, legally oriented book. I have changed now to Franklyn Haiman's new book. In fact I use two books by Haiman. His newest one is Speech and Law in a Free Society. It is an excellent book which covers all aspects of the First Amendment from a communication perspective. Franklyn Haiman, Professor of Communication Studies at Northwestern, understands law and he understands communication. I also use his earlier book, Freedom of Speech, published by the National Textbook Company in 1976. It is a short paperback (not to be confused with his first book, Free Speech: Issues and Cases). This book explains basic concepts and discusses briefly most of the important Supreme Court cases prior to 1976. It is useful when students can not get to the primary sources.

I do not use Robert O'Neil's Free Speech: Responsible Communication Under Law as a text although I do assign some reading in it. It is a good book, although out of date now and much too simple to be used as a text in an upper level course. I have recommended it to colleagues for a high school course as well as for a unit in a basic course.

There are several books of readings which contain selections from Supreme Court decisions and from free speech writers. I do not use them. I prefer to send students to primary sources for Supreme Court opinions and I expect them to go the the important First Amendment writers directly--that is I assign them to read John Stuart Mill, Alexander Meiklejohn

and others.

Within a year or two, Thomas Tedford from the University of North Carolina will have a new free speech book on the market. When that happens, I expect to use it instead of the small Haiman paperback. I have read chapters of Tedford's book and consider it excellent. While it is scholarly and rigorous, it is also written for a student audience. I think it will be very helpful.

Other Materials

I assign students to read Supreme Court decisions. I will indicate which ones when I discuss the specific units in my syllabus. They can be found in United States Reports and in constitutional law books. I also assign readings in the Free Speech Yearbook, communication journals and law reviews. I consider it important that students understand the judicial process, and I have written a ten page handout which explains how it works in relation to freedom of speech. Anyone who wants a copy of that handout is welcome to it.

Perhaps the most difficult part of teaching the course is keeping up with what happens in the real world. I think the instructor must keep track of what the Supreme Court does and be aware of current problems in free speech. This means regularly reading United States Law Week or Supreme Court Advance Sheets as well as daily newspapers. I believe the Sunday New York Times is very helpful as is the American Bar Association Journal. Perhaps one of the best sources for current happenings is the American Library Association's Newsletter on Intellectual Freedom which can be obtained for $10.00 per year from the American Library Association, 50 E. Huron Street, Chicaco, Illinois 60611.

I have tried several systems for keeping my course up to date. The texts of necessity become dated. For several years I wrote a monograph of about 100 pages each summer explaining "Developments in the Law." I copied it and distributed it to students and colleagues. This year I decided to try something new and I simply took all the clippings and notes that I had collected over the past year, sorted and labelled them and filed them in plastic covers in a looseleaf notebook. This semester I have gone to that notebook for every area, brought in the clippings and brought the students up to date. Perhaps I am just getting lazier, but it does seem to me that this system works as well as the other, and it is a lot less work.

Guest Lecturers, Films

I use guest lecturers in my classes. This is another reason why the evening hour is a good one. I sometimes have local attorneys talk on their speciality. I have had the attorney who represents the Milwaukee Journal talk on press law and an attorney who represents most of the adult bookstores in town discuss obscenity. I sometimes have a psychologist discuss the value of sexually explicit materials and I have

former graduate students discuss their research. One of the leading First Amendment authorities in the country is president of our university. Robert O'Neil knows as much or more about the First Amendment as anyone and he is willing to come to classes and talk when he can fit it into his schedule.

I have also used tapes and films. The American Library Association has an excellent film entitled "The Speaker." It illustrates the problem of a controversial topic in a public school setting. The television film on "Skokie" is also excellent. Audio tapes of Speech Communication Convention Programs are available and sometimes stimulating.

I do not use guest speakers and films as much as I used to, but I think they are good for variety. Sometimes, they are helpful in an area which is unfamiliar to the instructor. Most any community has available speakers. Sometimes it is the local newspaper editor, a local attorney or a member of Citizens for Decency Through Law. Most of us who teach courses would be willing to be guests and sometimes a telephone lecture is possible.

REQUIRED WORK

There is much required reading in this course. I try to weed out things as I add new sources, but students definitely complain that there is too much reading. I give two in-class exams and one take home examination. Each in-class exam is two hours long and consists of a few identification questions and two or three major essays. Usually, each essay is worth up to forty of 100 points. The students are given four to six topics and must write on two or three. The questions are fairly comprehensive and I expect information and analysis, not bullshit. A typical question might be:

> Discuss the clear and present danger test. Identify and describe the case in which it originated. What meaning of the test does that case suggest? Compare that interpretation with the circuit court in Masses v. Patten, Vinson in Dennis v. United States and the Court in Brandenburg v. Ohio. Please consider the type and context of the communication involved in each case. Which interpretation of the doctrine is most consistent with that of Haiman? Explain. Evaluate the test as applied to the cases we have studied in this unit.

Students rarely do well on the first exam. They are not used to writing long or involved essay questions. I always give them copies of previous year's examinations in advance, and I usually read examples of good answers. After the exam is returned I discuss it and allow them to rewrite one question if they wish. They do much better the second time around, and when they reach the second in-class exam, they do quite well.

Most students, however, prefer the take-home examination which requires them to pretend they are Supreme Court Justices and write an

opinion. I give them a statement of facts and the relevant law under which someone was convicted for some kind of expression. I ask them to write a five page opinion deciding the appeal in any way they consider appropriate. These papers are usually quite good; some are outstanding. By this time they have read quite a few judicial opinions. They often pick a particular Justice's style and sometimes they become quite eloquent. Once in a while I wish that our actual judges showed as much awareness of the communication process as do a few of my students.

Examinations are not the only thing. I require each student to brief on Supreme Court case and to write a five page paper on some aspect of a current controversy. Graduate students must read Legacy of Suppression by Leonard Levy and write a critique of it.

As I write this, it seems like a lot of work and it is. It probably would not hurt the "integrity" of the course to cut out or shorten one of the exams or perhaps cut the paper. I suppose when I get tired enough of grading all those papers for 40 to 50 students, I'll decide to omit something.

UNITS OF WORK

I. Introduction

During the first three weeks of class I attempt to introduce the students to the philosophical and historical foundations of the First Amendment and to familiarize them with the legal process. I assign the first two chapters in Mill's On Liberty, enough of Meiklejohn's Free Speech or Political Freedom to get his basic philosophy, and introductory chapters in Chafee and Haiman. We discuss the theory of the First Amendment and the varying justifications for freedom of expression in a free society. I tell students that I expect them to develop their own theory of free speech as we explore the development of the First Amendment in our society. In order to understand that development, we discuss the way constitutional law develops and how the judicial process works in relation to free speech. I use my handout and I lecture on this topic as well as assigning them to read an aritcle I write for the Free Speech Year Book in 1972. "Toward a More Realistic View of the Judicial Process in Relation to Freedom of Speech." We also talk about the extralegal restraints on speech.

II. Political Heresy and the National Security

Much of the basic development of First Amendment law has taken place in situations where the conflict has been between those who criticize the policy of the government in times of war or national emergency and those who are responsible for or supportive of government policy. This unit, therefore, is important not only in illustrating how law develops in response to situations, but also in establishing a framework in which other free speech problems may be considered. Chafee is a basic source in this unit. Most First Amendment writers consider that the development of relevant law started during the First World War with the

Espionage Acts and the subsequent litigation. While this is substantially true, a lightly different perspective is suggested by David Rabban in a 1981 Yale Law Journal article, "The First Amendment in its Forgotten Years." This article is also assigned. Both readings also clearly illustrate that laws are not made in a vacuum, but are a result of popular feelings which in themselves also serve as an additional restraint on free speech.

Between 1918 and the present time there has been much legal development. Most of the relevant standards such as "Clear and Present Danger," "Remote Bad Tendency," "Clear and Probable Danger," "Preferred Position," "Balancing Doctrine," and "Incitement to Illegal Action" have developed in situations relating to national security. There are Supreme Court decisions to read from this period and commentaries which invite discussion. I ask students to read the opinions in the following cases for this unit:

Schenk v. United States, 249 U.S. 47 (1919).
Abrams v. United States, 250 U.S. 616 (1919).
Whitney v. California, 247 U.S. 357 (1927).
West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).
Dennis v. United States, 341 U.S. 494 (1951).
Yates v. United States, 354 U.S. 298 (1957).
Barrenblatt v. United States, 360 U.S. 109 (1959).
Brandenburg v. Ohio, 395 U.S. 444 (1969).

In addition I ask them to read an article by Paul Siegel, "Protecting Political Speech," in the Quarterly Journal of Speech in 1981. Siegel discusses legal development since Brandenburg. I also assign the relevant parts of both Haiman texts and other commentaries which vary from year to year depending on what I find in current journals.

After this unit I give the first examination. After that students are either prepared to drop the course or consider the next unit. I must be getting easier; drops are becoming fewer.

III. Provocation to Anger and Disturbing the Peace.

Although many students initially say they can hardly wait for the obscenity unit, I think that most of them actually like this unit the best. Perhaps that is because it involves situations with which they are somewhat familiar. Some still remember the Civil Rights and Anti-War protests of the 60's or at least have heard about them. Most have heard about the Nazi and KKK demonstrations; they all know something about the Moonies and other unpopular religious groups and many belong to racial, sexual or ethnic groups which are objects of jokes and slurs. Most of the Supreme Court cases assigned in this unit are interesting and the other readings are controversial. Students are introduced to the "Fighting Words" doctrine and the very real problem, especially on college campuses in Wisconsin, of the "Hecklers' Veto." This is where I use "The Speaker" and it arouses much discussion. I assign the following cases:

Hague v. C.I.O, 307 U.S. 496 (1939).
Cantwell v. Connecticut, 310 U.S. 296 (1940).
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
Terminiello v. Chicago, 337 U.S. 1 (1949).
Kunz v. New York, 340 U.S. 290 (1951).
Feiner v. New York, 340 U.S. 315 (1951).
Coates v. City of Cincinnati, 402 U.S. 611 (1971).
Edwards v. South Carolina, 372 U.S. 229 (1963).
Gregory v. Chicago, 394 U.S. 111 (1969).
Cohen v. California, 403 U.S. 15 (1971).

An early article in the April, 1967 Quarterly Journal of Speech by Franklyn Haiman, "The Rhetoric of the Streets," is required reading in this unit as are articles I have written for the Marquette Law Review (Spring, 1973) on the Hecklers' Veto, in the Free Speech Yearbook (1978) on the Nazis and in the Quarterly Journal of Speech (April, 1979) on Group Libel. One of the advantages of teaching has to be that you can require someone to read what you write. After this unit comes the take-home examination.

IV. Obscenity, Pornography and the Law.

This is both an interesting and a difficult unit to teach. Most students have opinions on what types of sexually explicit materials should be prohibited. These opinions are usually based on unexamined assumptions, and examining them is sometimes a touchy business. They are based on values which are often mixed up with ideas on religion and feelings about parents, experiences with sex and sex education and many unverbalized fears and conflicts. That is probably true for all of us, but for students, the church and family are closer and perhaps more threatening. I blunder ahead, nevertheless. I sometimes show explicit films in my classes. I do tell students they need not attend, but few if any have ever taken that option. I sometimes use a psychologist as a lecturer. He believes that people should be desensitized to their fear of sex and he works with medical students to do this. He is convinced that we must learn to deal with our sexual problems and that sometimes pornography is helpful. The speaker is a scholarly, elderly man with an air of goodness and wisdom. The students who have been expecting a "dirty old man" often have to struggle to deal with their dissonance. I try to be sure that all views are presented even when my heart is not in it. Usually by this time the students are willing to express their views, and most views are present. I find the older students to be especially valuable here.

There is a plethora of interesting reading available. I expect them to be familiar with the conclusions of the President's Commission on Pornography and Obscenity. I discuss with them the changes in the kind of pornography since that report which might cause some change in the findings if the study were done today. We discuss the research on violence in films and television and the experiences of Scandinavia, England and France. I assign fewer Supreme Court cases in this unit, but I do expect them to read the basics, notably:

Roth v. United States, 354 U.S. 476 (1957).
Miller v. California, 413 U.S. 15 (1973).
Jenkins v. Georgia, 418 U.S. 87 (1974).

I discuss many other cases if only to show that the courts have never been able to resolve the problem of sexually explicit materials. Most decisions are by a five to four vote. In this unit I try to discuss what has happened in Wisconsin communities. We have had many anti-pornography campaigns in the past five years and such case studies are often of interest to students. They seem particularly interested in the ramifications of contemporary community standards in this area.

V. Current Controversies

This final unit is a catch-all which expands and contracts as the world changes (or turns). I currently list eight controversies. They are:

A. Libel and Invasion of Privacy
B. Symbolic Speech
C. Right of Access to the Media
D. Commercial Speech
E. Gag Rules and Closed Courtrooms
F. School Censorship
G. Reporters' Shield
H. Free Speech in Wisconsin

While I would like to allow more time for this unit, I am usually forced to limit it to three weeks. This is where the students do their papers. They may chose any one of the controversies and write a five page paper on it. I include basic readings under each area on the syllabus, but I encourage students to go outside of that list to specific incidents which they have observed or heard about. Often several students will have had some experience with school censorship in their communities. They may wish to do a case study of that experience. I often have a mass communication student who is interested in some press law controversy, and there is usally some student especially interested in nonverbal communication who wants to study a specific kind of symbolic speech. They are given many options, but they must come up with a paper and a short oral report. I do not grade the oral reports, but I do require them. They are often very interesting and the students seems to enjoy listening to each other. By this time, they know they can say just about anything which they can back up with some kind of logic or evidence. I try to keep my mouth shut for a change and a good time is had by all.

During this unit I usually have at least one guest speaker. This semester it will be an attorney discussing press law.

Final Examination

The final examination covers units four and five. It is a closed book, two hour exam much like the first one. They are required to write a

question on the obscenity material and one on some unit five controversy other than the one they wrote their paper on. They might also be asked to describe their current philosophy of the First Amendment. Usually these exams are substantially better than the first one.

CONCLUSION

Sometimes I have good classes which I think I teach well. Sometimes I believe I absolutely bomb. I hope that I am getting better. I know that I work hard at teaching this course, and that is not true of every class I teach. I find the subject matter constantly changing and thus challenging. I believe I see students improving in their ability to analyze problems. I think they are exposed to new ideas and new authors. It is more fun and almost as much work as coaching debate. The hours, however are better.

Anyone who is not bored to death by now is welcome to give me a call if you now teach a course in free speech or are interested in teaching one. I will try to be as helpful as I can.